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HISTORY'S STORIES

*Stephan Landsman**

STORIES OF SCOTTSBORO. By *James Goodman*. New York: Pantheon Books. 1994. Pp. xiii, 465. \$27.50.

I. AN INTRODUCTION TO THE SCOTTSBORO LITIGATION¹

On a chilly morning in March 1931, a score or more teenage hoboes boarded a Southern Railroad freight train in Chattanooga, Tennessee. Some time later, as the train pulled out of Stevenson, Alabama, on its westward journey to Memphis, Tennessee, black hoboes and white hoboes got into a fight. The blacks won and forced all but one of their white antagonists to alight from the moving train. The white boys immediately ran back to Stevenson to complain to the stationmaster about the blacks and to "press charges against 'em."² The stationmaster called ahead to the Jackson County, Alabama, Sheriff in Scottsboro to have the train stopped. As luck would have it, the train had just left Scottsboro. Undeterred, the Scottsboro Sheriff, M.L. Wann, called ahead to Paint Rock, Alabama, and ordered one of his deputies to assemble an armed posse to "capture every negro on the train and bring them to Scottsboro."³

When the posse stopped the train, it took nine black youths into custody, thus beginning one of the most significant cases in American legal history. It began because, in addition to the nine black teenagers, the posse found two young white women on the train. After hesitating briefly, the women charged the youths with gang rape. The arrested boys were taken from Paint Rock to Scottsboro amidst growing public hostility. Confronted by an angry mob, Sheriff Wann called the Alabama Governor, Benjamin Meeks Miller, who dispatched the National Guard to Scottsboro to prevent the enraged citizens from lynching the black hoboes.

The accused boys were indicted on March 31 and tried on capital rape charges beginning on April 6, 1931. No counsel agreed to represent them until the morning of the first day of the first trial.

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1. Unless otherwise noted, the factual material in this introduction is drawn from DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 1979) and JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994).

2. CARTER, *supra* note 1, at 4.

3. *Id.*

The lawyers who eventually took the boys' cases were incapable of preventing the proceedings from degenerating into travesties of justice in which prejudice and terror won out over fair consideration of the facts. Scottsboro juries condemned all the boys to death, save thirteen-year-old Roy Wright. In Wright's case, the jury hung eleven to one in favor of the death penalty despite the prosecution's specific request for life imprisonment.

At this point, the Scottsboro trials departed from the pattern established in previous Southern interracial rape cases. Lawyers from the International Labor Defense (ILD), a Communist Party front organization, contacted the boys and eventually became their counsel. The ILD and its allies turned the Scottsboro case into a *cause célèbre* discussed in newspapers and at rallies across the nation. The ILD lawyers appealed the verdicts in the boys' cases, first to the Alabama Supreme Court and later to the U.S. Supreme Court. The latter heard oral argument in the boys' cases on October 10, 1932. In its precedent-setting decision, *Powell v. Alabama*,⁴ the Court ruled:

In the light of the facts outlined in the forepart of this opinion — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives — we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.⁵

The *Powell* decision was a dramatic departure for the intensely conservative Supreme Court of the early 1930s. It marked the beginning of heightened Supreme Court sensitivity to the inequitable treatment the criminal justice system accorded African Americans and demonstrated the Court's willingness to utilize the Constitution to redress palpably unfair criminal trial procedures.⁶

The Court returned the Scottsboro case to the Alabama courts for retrial. The ILD persuaded one of the finest criminal trial lawyers of the day, New Yorker Samuel Leibowitz, to represent the boys. On March 27, 1933, after a change of venue, the first of the retrials began before Judge James E. Horton in Decatur, Alabama. Leibowitz vigorously challenged both the exclusion of African

4. 287 U.S. 45 (1932).

5. 287 U.S. at 71.

6. To underscore the importance of the *Powell* decision, Goodman cites an essay by Felix Frankfurter in the *New York Times* in which the Harvard law professor saw in *Powell*'s use of the Due Process Clause a "return to [its] more immediate purpose of protecting black men from oppressive and unequal treatment by whites." P. 89 (quoting Felix Frankfurter, *The Supreme Court Writes a Chapter on Man's Rights*, N.Y. TIMES, Nov. 13, 1932, at E1-E2).

Americans from the jury and the merits of the State's case. Although Judge Horton ultimately overruled the defense challenge to the jury system, he found that Leibowitz had established a "prima facie" case regarding the exclusion of blacks from the jury. At trial Leibowitz brutally attacked the character and credibility of one of the alleged rape victims, Victoria Price, focusing especially on her lack of chastity and her sexual activity in the forty-eight hours before she claimed the boys assaulted her. Leibowitz convincingly demonstrated that a doctor's examination conducted shortly after Price made the charges undercut her claims. Leibowitz concluded the defense case by calling the second alleged rape victim, Ruby Bates, to the stand. She denied that any rape had taken place. Despite the defense's strong presentation and in the glare of national publicity, the all-white jury convicted defendant Haywood Patterson and sentenced him to death. In June 1933, Judge Horton overturned the jury verdict, holding that the prosecution had not proved Patterson's guilt beyond a reasonable doubt, and ordered a new trial.

Judge Horton's ruling incensed the majority of white Alabamans. The Alabama Attorney General, Thomas Knight Jr., and others worked furiously to remove Judge Horton from the case and to try the defendants as speedily as possible. Knight realized both of these objectives in October 1933, when Horton withdrew and was replaced by Judge William Callahan, the second judge in the Decatur district. Callahan increased the pace of the litigation and sought to thwart the defense counsel at almost every turn. Despite the judge's resistance, however, Leibowitz again presented substantial proof of jury segregation. At trial Callahan placed a series of new impediments in the defense's way. He blocked virtually all references to Victoria Price's character and refused to allow any discussion of her sexual conduct in the hours before the rape. The latter decision was especially damaging because it prevented the defense from providing any alternative explanation for the semen found during Price's medical examination after the alleged assault. Without hesitation jurors convicted Haywood Patterson and Clarence Norris, the two Scottsboro defendants brought before them. The length and bitterness of the trials, however, led to the postponement of further hearings while Leibowitz appealed these two decisions.

In the aftermath of these trials, the U.S. Supreme Court, for a second time, accepted a Scottsboro case for review, *Norris v. Alabama*.⁷ In February 1935, the Court heard Samuel Leibowitz argue forcefully that the record clearly demonstrated Alabama's jury segregation and that such segregation was unconstitutional. The pres-

7. 294 U.S. 587 (1935).

ence of a Jackson County, Alabama, jury roll that had been tampered with to make it appear that a small number of black residents were eligible to serve as jurors bolstered Leibowitz's argument. On April 1, 1935, the Supreme Court declared that Alabama had unlawfully excluded African Americans from its juries and required Alabama to overturn the Scottsboro convictions.⁸

In the face of continuing national scrutiny, the case returned to Judge Callahan's Morgan County courtroom in January 1936. Again, Samuel Leibowitz appeared on behalf of Haywood Patterson. Again, Judge Callahan sharply curtailed the defendant's case. And, again, the jury convicted based on the dubious testimony of Victoria Price. The difference was that, for the first time, an Alabama jury fixed a penalty less than death — a seventy-five-year jail term. This "loss" shocked the prosecution. It withdrew from a set of cooperative procedural agreements with the defense and, thereby, forced another postponement of the proceedings. As the angry defendants were being transferred back to jail after the Patterson trial, defendant Ozie Powell slashed the throat of a deputy sheriff. This act set off an uproar in Alabama, where people demanded swift punishment for the defendant, and across the nation, where many more sympathetic citizens called for an explanation of the brutal and suspicious conduct of corrections officials.

Both sides were wearying of the courtroom contest and constant media scrutiny by the end of 1936. In December of that year Prosecutor Knight and Leibowitz negotiated an apparent bargain. Because of Judge Callahan's intractability, however, this deal fell apart, and in July 1937, another round of trials began. Alabama jurors convicted three defendants of rape, Clarence Norris, Andrew Wright, and Charley Weems. Ozie Powell pleaded guilty to assaulting the deputy in the throat-slashing incident. Immediately thereafter, under somewhat mysterious circumstances, the state released the remaining four Scottsboro boys — Eugene Williams, Olen Montgomery, Willie Roberson, and Roy Wright — without further proceedings. The prosecutions came to an end with five boys incarcerated and four boys free on precisely the same evidence. In June 1950, the state paroled the last of the defendants held in an Alabama prison. The defendants had been through eleven jury trials. They had been convicted in each trial on the flimsiest of evidence. They had been convicted despite overwhelming national criticism, representation by one of the best criminal defense lawyers in the country, and two favorable decisions by the U.S. Supreme Court. Although the Scottsboro boys escaped the death penalty, they were never able to convince an Alabama jury of their innocence.

8. 294 U.S. at 599.

The Scottsboro saga has had a significant impact on American law and history. For Northerners it dramatized one of the most vicious aspects of Southern racism. For Southerners it raised all sorts of questions about justice, interracial sex, and the region's relationship to the rest of the nation. The Supreme Court's decisions in *Powell* and *Norris* were harbingers of a new, more active federal judiciary ready to use the Constitution to protect the rights of citizens, especially African Americans, threatened by gross manifestations of prejudice. Courts throughout the nation have relied on the Scottsboro precedents literally thousands of times since the Supreme Court decided them.⁹

A huge number of books and articles have been written about Scottsboro over the past sixty years.¹⁰ The case seems to have become inextricably imbedded in America's historical consciousness. It is hard to say why this is so, but the case's story of interracial sexual accusations seems to personify both the fears of whites and the vulnerability of blacks. The case has served as a rallying point for groups with a wide range of different concerns. Susan Brownmiller, in her 1975 book, *Against Our Will: Men, Women and Rape*,¹¹ discusses Scottsboro at length and presents it as a classic example of the ways in which the white-male power structure twists historical reality to vilify women and retain power. She powerfully argues that white men have distorted the case to suggest "that lying, scheming white women who cr[y] rape [are] directly responsible for the terrible penalties inflicted on black men."¹² Brownmiller's point has undeniable force especially in light of the apparent misogyny of a number of the key participants in the case and her persuasive contention that whatever Victoria Price and Ruby Bates did was motivated by fear of those men in power in Jackson County.¹³ A strikingly different use of the Scottsboro story can be seen in some of the reactions to the 1990 accusations against a group of young African Americans concerning the brutal rape and near murder of a white jogger in New York's Central Park. The young men's defenders repeatedly asserted, despite overwhelming evidence to the contrary, that there had been no rape, that a legal lynching was under way and that the Central Park case was another Scottsboro.¹⁴

9. A computerized citation search for the *Powell* case yielded citations in 3708 cases and 129 law review articles. A citation search for the *Norris* case yielded 615 case citations and 32 law review article citations.

10. Goodman's bibliography, for example, is ten pages long. Pp. 435-44.

11. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

12. *Id.* at 230.

13. *Id.* at 233-34.

14. See JOAN DIDION, *Sentimental Journeys*, in *AFTER HENRY* 253, 264 (1992).

II. STORIES OF SCOTTSBORO

Harvard historian James Goodman has provided us with a unique vision of the Scottsboro case in *Stories of Scottsboro*. It is a multi-faceted vision created by including a wide array of perspectives on Scottsboro, ranging from those of the boys, their counsel, and their sympathizers on the one side, to their alleged victims, the state prosecutors, and the vast majority of white Southern onlookers on the other. As Goodman describes it, the book is

a history of the court case and controversy, a narrative history in which I move, chapter by chapter, from one point of view to another, until I have recounted the events on that freight train, at the depot in Paint Rock, outside the Scottsboro jail, in and around the Scottsboro courthouse, and all over the country in subsequent years from the perspectives of a wide range of participants and observers. I answer the question "What happened?" with a story about the conflict between people with different ideas about what happened and different ideas about the causes and meaning of what happened — a story about the conflict between people with different stories of Scottsboro. [p. xii]

In Goodman's hands, this method of retelling Scottsboro yields a series of significant benefits, including the brilliant exegesis of several critical events in the case; the creation of vivid portraits of many of the participants in the conflict; and the discovery of novel insights about the litigation through the examination of previously disregarded points of view. Each of these benefits, however, has concomitant costs that ought to be noted in assessing the value of producing history through the narration of multiple stories.

One of Goodman's greatest successes is his reconstruction of critical moments in the contest by providing a series of overlapping views of those moments. This technique lends greater depth and life to such episodes than would otherwise be possible. Its value is perhaps most apparent with respect to the first series of Scottsboro trials, held in April, 1931. Goodman discusses these hearings from the widest array of perspectives, starting with those of the bewildered and fearful boys (pp. 3-10). He turns from the defendants to the majority of white Alabamans, a group that heard and believed ghastly rumors and press reports of the abuses allegedly suffered by the victims. From the white Southern majority point of view, the case appeared to be a nightmare of black lust and violence (pp. 11-18). Goodman moves from the general run of white Southerners to the alleged victims, Price and Bates. He deftly sketches the perspective of two poor white women stuck on the bottom rung of Southern society, powerless outcasts in their own community, whose lifestyle drew them perilously close to the public violation of sexual taboos that could threaten their safety (pp. 19-23). It is from

this vantage point that Goodman starts to try to decipher the mystery of their clearly false accusations.

Goodman then shifts from the individuals' perspectives to the views of three organizations that supported the boys: the Communists, who, in the wake of the recently concluded agitation over Sacco and Vanzetti, saw the case as a prime opportunity for "mass education and mobilization" (p. 27); the NAACP, which sought a courtroom solution to racial oppression rather than encouraging public agitation; and the ACLU, whose Hollace Ransdall gathered facts about the women that both revealed their plight and raised questions about their morals and the veracity of their statements.

Goodman then branches out from fairly traditional sources and describes the views of less obviously connected parties, including, first, members of the Southern black middle class. These blacks felt compelled to walk a fine line between publicly condemning any suggestion of interracial sexual violence and expressing the most profound concerns about the unfairness of the trials. Goodman primarily relies on the stories and reflections of two black newspaper editors, Oscar Adams of the *Birmingham Reporter* and Sol Johnson of the *Savannah Tribune* (pp. 62-66). The recovery of these voices and the story of their subtle but unceasing efforts to dramatize the problems crystallized by the Scottsboro charges and trials are among the most exciting in the book. This section is followed by an equally effective analysis of Northern black intellectuals' views of the case. Again, we hear from black editors and writers, including: Robert Vann of the *Pittsburgh Courier*; W.E.B. Du Bois, then writing for the NAACP journal, *Crisis*; Robert Abbott of the *Chicago Defender*; and the great poet and novelist Langston Hughes (pp. 67-73). The richness and variety of these offerings enlivens our thinking about Scottsboro and highlights its special meaning for African Americans across the nation in the 1930s.

Goodman expands the picture even further when he tells us about Hosea Hudson and Ned Cobb, poor Southern black laborers radicalized by the Scottsboro affair and its attendant turmoil. These two men joined the Communist Party and chose to dedicate their lives to challenging the oppression that Scottsboro came to symbolize for them (pp. 74-82). The boys' parents provide a final black perspective on the Scottsboro trials (pp. 82-84). In the end, all these views paint a hundred-page portrait of a complex series of trials that white Southerners generally praised because they avoided lynchings, while blacks in all parts of the country as well as Northern whites damned them as a travesty governed by overt racism.

The downside to this intensive focus on the first series of trials is that it takes up an enormous amount of narrative energy, drawing

attention away from later and more protracted aspects of the Scottsboro case. Devoting the initial hundred pages of a four-hundred-page book to the events of the first several months of the case leaves proportionally less space for consideration of the events of the subsequent six years. Several of these events, most particularly the last set of trials held in 1937 and the failure of the parties to abide by the Knight-Leibowitz compromise struck some months before, deserve more extended treatment than Goodman accords them. The reader of *Stories of Scottsboro* is left in a quandary about why the proposed settlement failed, how the last set of trials compared to its predecessors, and why, after five of the boys were convicted of various charges, the State of Alabama decided to release the remaining four boys. Goodman does not analyze carefully the anomaly of Alabama's willingness to create two groups, one free and one incarcerated, on exactly the same evidence.

The multiple-story method of exploring major events presents another problem as well. It tends to result in an episodic and repetitious narrative. As the same events are retold from different perspectives, certain information is reiterated virtually verbatim. A description of Morgan County Solicitor Wade Wright's closing argument in the trial held before Judge Horton, Haywood Patterson's second trial, is the subject of almost identical descriptions in two successive chapters (pp. 133, 143). Discussions of a series of lynchings carried out in 1933 (pp. 204, 210) and descriptions of the backgrounds of various of the nine defendants are similarly repetitive. In each case the information is important, but its repetition detracts from the liveliness of the narrative.

Just as the overlapping perspectives of different actors enable Goodman to recreate critical moments in the Scottsboro litigation, the overlapping perspectives also facilitate the development of compelling portraits of many of those touched by the events of Scottsboro. Goodman does an outstanding job in bringing the nine boys to life and in breaking this group, so frequently portrayed as a single entity, into its human constituents. Goodman invests each boy with his own hopes, fears, strengths, and weaknesses. Haywood Patterson is fleshed out as a tough kid who, in jail, grew into a hardened convict wise in the ways of prison life and willing to describe himself as a "devil" (p. 364). He freely admitted keeping a "gal-boy" prisoner lover (p. 364), fought other prisoners, resisted guards, and generally challenged the system. He was caught attempting to carry a knife into an interview with the Governor of Alabama and was eventually classified as an incorrigible offender who could never live in society. Yet, he alone among the boys planned and carried out a successful escape from an Alabama prison that took him to Detroit, where he made a new life, and, in cooperation with Earl Conrad, wrote a book about his experiences

(p. 380). His story tells us more about prison life in the 1930s and 1940s South than any scholarly study could.

Equally moving is the tale of Roy Wright, the youngest of the defendants. When Roy was arrested at thirteen, he had virtually no idea what was happening in and around the Scottsboro courtroom. Deputy sheriffs whipped him until he agreed to testify against the other defendants (p. 97). His story is one of constant mistreatment from the beginning of his incarceration until his release. He keenly felt the passing of his youth as the case dragged on and suffered miserably during a year in solitary confinement. He was released in 1937, after which he went on an ILD fundraising tour of America and then to vocational school (pp. 339-40, 354). He finished his education, served in the army, and married. Eventually, he joined the merchant marine. In 1959, after returning from a voyage, he had a quarrel with his wife, killed her, and committed suicide (p. 384). Although Wright was arguably the most "normal" of the boys, he clearly carried the scars of the Scottsboro experience.

Goodman's stories bring to life others besides the boys. One of the most interesting is a seldom-recognized hero, Allan Knight Chalmers (pp. 278-87). Chalmers was among the best and brightest of his generation. He was a gifted athlete and scholar. When World War I began, he tried to join the U.S. Army and was rejected because of a heart murmur. Undeterred, he volunteered to serve in the French army. The bloody waste he saw at Verdun led him, after the war, to embrace pacifism. In 1922, Chalmers graduated from Yale Divinity School and became a minister. He dedicated the remainder of his life to fostering decency, understanding, and peace. His was a ministry of social activism. He argued that "[t]o serve justice was also to serve love" (p. 280). When Chalmers became acquainted with the facts of the Scottsboro case in 1931, he immediately entered the fray. He willingly joined forces with anyone interested in the boys' freedom, no matter what his ideology. In 1935, he assembled the Scottsboro Defense Committee in an effort to resolve the case. Chalmers persuaded a substantial number of skittish Southerners to join in that effort through his commanding presence and unimpeachable integrity. Although the boys' antagonists thwarted him at virtually every turn, he kept working for the good of the boys. His efforts continued long after the case was little more than a dim memory to most Americans. Through the 1940s Chalmers labored to win the release from prison of the remaining Scottsboro defendants. Chalmers was also a steadfast source of encouragement and support for the men who had been freed. He was the rescuer who, without a thought for himself, strove to help the Scottsboro defendants.

Despite the general strength of Goodman's portraits, he sometimes appears to allow approbation or antipathy to govern his characterizations. His approval of Hosea Hudson, the black Southern iron molder turned communist, is so strong that it begins to have the ring of hagiography. All Hudson's activities are made to sound noble, all his friends are "comrades," and his enemies are "snitches" and worse (p. 76). Goodman here seems to embrace as his own the rhetoric of the 1930s left. In addition, Goodman occasionally seems unable to consider dispassionately the attitudes of a number of white Southerners involved in the case. His description of the mental landscape of Wade Wright, the Morgan County Solicitor, suggests the nature of the problem:

Wright — like Callahan, Bailey, and Knight — could no more neatly or easily separate the attack on the white youths from the attack on Price and Bates than he could have separated his ideas about communism and northern interference from his ideas about white supremacy and segregation; his ideas about white supremacy and segregation from his ideas about black women and men; his ideas about black women and men from his ideas about white women; his ideas about white women from his ideas about rape; his ideas about rape from his fear of black women and men; his fear from his hatred and his hatred from his fear; and his hatred and his fear from his understanding — however ephemeral, mistaken, infinitesimal, unconscious, incomplete — of the thoughts and feelings that had to have lurked in black minds, of the answer to a common question: How would I feel if I were in his skin? [pp. 222-23]

While this passage evinces a deep emotional connection to the issues in the case, it lacks the helpful balance and sympathetic insight found in the great bulk of *Stories of Scottsboro*.

The use of a multiplicity of perspectives helps Goodman provide a series of novel insights about the case. One of the most striking is the way one can fit this story of Southern racist violence into the larger historical framework of the 1930s. As Goodman reminds us, reports of the 1933 trial of Haywood Patterson ran alongside reports of Hitler's rise to power in Germany (pp. 150-51). Nazi racism and anti-Semitism were topics of the keenest media attention as Morgan County Solicitor Wade Wright exhorted jurors in Decatur not to let "Jew money" buy Southern justice in his closing argument in Haywood Patterson's second trial, before Judge Horton. As Goodman nicely puts it, "one story became an aid to understanding the other" (p. 151). Leibowitz eventually accused Alabamans of raising "the Hitler cry," and he came to feel not only that he was representing the targets of racism but that he was one of those targets himself (pp. 151-52). These connections may help explain how and why the battle between North and South became so sharp in the Scottsboro case, why the Supreme Court decided to intervene in the Scottsboro litigation twice, and what wellsprings

Leibowitz drew upon to find the strength to continue fighting long after it appeared victory was beyond his grasp. In a way, Scottsboro may have served as an inoculation against the fascism and scientific racism that many in the Western world flirted with in the 1920s and early 1930s. It was a convenient focus for those who saw the rise of Nazism as a danger not only in Germany but in America as well.

Of course, for Southerners the connection between the Scottsboro case and Nazism was far from apparent. A substantial number of them perceived the situation as historian Frank Owsley presented it at the 1933 annual meeting of the American Historical Association in a paper called the "Third Crusade, the sequel to Abolition and Reconstruction" (p. 113). Goodman sketches Owsley's thesis as follows:

In each of the first two crusades . . . northern crusaders — not authentic crusaders but "sentimental dupes," "hired tools cloaking motives of material gain in robes of morality" — had attempted to ride the Trojan horse of Negro rights into the South in order to gain power for themselves at the expense of white and black people alike. In each instance, northeastern industrialists and their intellectual allies had used the Negro as a pawn to further their own political and economic ends. In each instance, the northerners' great mistake — interfering with the relationship between blacks and whites in the South — developed into war upon the South. In each instance, the North's pillaging of the South in the guise of a moral campaign resulted in the worsening of relations between whites and blacks. After abolitionism began, southerners were forced to defend and tighten an institution they had previously considered abolishing. After redemption, whites retaliated against black men and women for their conduct during Reconstruction. [p. 113]

Viewed from this perspective, Scottsboro and the Communist campaign against Southern justice could be construed as a third concerted assault by the North on the South after the abolitionist movement and Reconstruction. Arguably, the previous crusades had taught the South the necessity of resisting Northern pressures and preserving its way of life.

While such an interpretation of the history of the Civil War may not have been embraced wholeheartedly outside the South, the "crusade" hypothesis about Reconstruction and its aftermath had become widely accepted by the 1930s. Goodman demonstrates this by tracing the shift in historical and popular thinking about Reconstruction during the early twentieth century (pp. 105-110). The conceptual transformation of the post-Civil War era into an heroic white struggle for survival may be linked to the efforts of a group of scholars associated with Columbia University. Their leaders were political scientist John Burgess and historian William Dunning (pp. 107-08). Their ideas entered the popular mainstream in 1905 when Thomas Dixon published his wildly successful novel, *The Clansman*.

The ascendance of this interpretation of events was assured in 1914 when D.W. Griffith, in collaboration with Dixon, produced his classic film, *Birth of a Nation*. The film was not only a popular success but persuaded millions of Americans that the rise of the Klan in the Reconstruction South was essential to the salvation of white Southerners. President Woodrow Wilson screened the film at the White House and reportedly remarked that Griffith's work was "like writing history with lightning . . . and my only regret is that it is all so terribly true" (p. 108).

Most Americans missed the racist implications of a view that endorsed Ku Klux Klan violence and the oppression of newly freed black citizens. As Goodman forcefully notes, such observations were left to a small group of black politicians, historians, and thinkers, including John Roy Lynch, W.E.B. Du Bois, and Carter G. Woodson (pp. 158-60). As Du Bois wrote in the last chapter of his 1935 volume, *Black Reconstruction in America*:¹⁵

Three-fourths of the testimony against the Negro in Reconstruction is on the unsupported evidence of men who hated and despised Negroes and regarded it as loyalty to blood, patriotism to country, and filial tribute to the fathers to lie, steal or kill in order to discredit these black folk[] . . . One fact and one alone explains the attitude of most recent writers towards Reconstruction[;] they cannot conceive Negroes as men; in their minds the word "Negro" connotes "inferiority" and "stupidity" lightened only by unreasoning gayety and humor.¹⁶

Goodman's careful tracing of this story not only provides a convincing intellectual context for Southern views of Scottsboro; it underscores the value and impact of the work of historians as well as the serious consequences of the revision of historical thinking.

The development of new perspectives like those involving the rise of Nazism and the revision of Reconstruction history are among the outstanding intellectual achievements of Goodman's work and make the book a feast of new insights. Goodman's intellectual energy flags, however, when he turns his attention to more traditional aspects of the case. Scottsboro, for all its social implications, was a set of legal proceedings in a court of law. One of the perspectives that deserves careful scrutiny is the legal one. It is here that Goodman's storytelling needs enrichment. The Supreme Court decision in *Norris v. Alabama*¹⁷ broke new ground. It signaled, for the first time in decades, the federal courts' willingness to

15. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Frank Cass & Co. 1966) (1935).

16. P. 160 (quoting DU BOIS, *supra* note 15, at 725-26).

17. 294 U.S. 587 (1935).

insist upon the equality of minority citizens.¹⁸ African Americans across the country celebrated the outcome of the case (pp. 248-50). How the Court reached its decision is one of the most interesting questions in the history of Scottsboro. Yet Goodman pays scant attention to this matter from the perspective either of the lawyers who framed the issues or of the eight Justices¹⁹ who decided it.

Norris was clearly a triumph for Samuel Leibowitz. From the outset of his involvement in the case, Leibowitz worked to create a record that would prove the absolute exclusion of blacks from Alabama juries. He began to build his record at the pretrial hearing before Judge Horton in March 1933. At that hearing he attacked the composition of the Jackson County (Scottsboro) jury pool. He called the editor of the Scottsboro newspaper, James Stockton Benson, and the President of the Board of Jury Commissioners, J.E. Moody. Through careful and tenacious questioning, he was able to demonstrate that no black citizens had sat on a Scottsboro jury in modern memory and that their participation had not even been considered.²⁰ Leibowitz did not leave his proof at this. He took what his biographer, Quentin Reynolds, claims was the unprecedented step of calling to the stand nine black Jackson County citizens to demonstrate that there were African Americans in the community fully qualified to sit on juries.²¹ Here one glimpses the fine hand of a skilled trial lawyer creating a record infused with the words and presence of living exhibits that contradicted the State's claims about qualifications and availability. In addition, *Norris* demonstrates the extraordinary courage of the black citizens of Jackson and Morgan counties who stepped forward and testified on behalf of their right to be jurors. Leibowitz artfully orchestrated the presentation, but it was their courage that made it possible.

In the face of Leibowitz's powerful proof, Attorney General Knight shifted the nature of the State's defense of its jury system. Knight stopped arguing that there were no qualified black juror prospects and instead asserted that there was no proof that all blacks had been excluded from the rolls (p. 123). Leibowitz doggedly pressed the attack by demanding production of the jury rolls. Although Horton overruled Leibowitz's motion, Leibowitz pressed

18. For earlier evidence of somewhat similar concerns, see *Moore v. Dempsey*, 261 U.S. 86 (1923) (holding that the Due Process Clause guarantees an impartial court, free from hysteria and mob spirit); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating a grandfather clause that exempted from literacy test all persons and their descendants who had been entitled to vote prior to the passage of the Fifteenth Amendment).

19. Mr. Justice McReynolds recused himself from the case. 294 U.S. at 599.

20. See CARTER, *supra* note 1, at 194-96.

21. See QUENTIN REYNOLDS, *COURTROOM: THE STORY OF SAMUEL S. LEIBOWITZ* 263 (1950). Although Reynolds states that Leibowitz called a dozen black witnesses, Carter and Goodman both fix the number called from Jackson County at nine. P. 121; CARTER, *supra* note 1, at 198.

forward. After a one-day recess, he began presenting proof about the exclusion of blacks from the Morgan County (Decatur and environs) jury pool. Leibowitz again interrogated jury commissioners and this time succeeded in persuading the judge to have the jury rolls produced. Leibowitz then presented twelve prospective black jurors eminently qualified to sit. Eventually, Horton overruled Leibowitz's second jury challenge but found that the defense had made a *prima facie* case of exclusion (p. 124).

This painstakingly assembled record was incorporated into the first trial held before Judge William Callahan in January 1936 (p. 216). Callahan ruled that on the basis of the record presented, there was no unlawful exclusion of blacks from the jury rolls of Morgan County. Reversing Judge Horton's ruling, Judge Callahan called for the production of the Jackson County jury rolls. This was a curious, perhaps even suspicious, decision for a staunch supporter of the prosecution to have made. Whether Callahan had been informed that the records would help the State is impossible to determine. J.E. Moody, who had previously testified, appeared with the Jackson County jury rolls. Leibowitz forced him to read the rolls, entry by entry, to prove that there were no black enrollees. Eventually, to everyone's apparent surprise, it was discovered that there were at least ten blacks listed on the rolls. Oddly, the names of all the potential black jurors were written just above or touching a red line drawn by a county clerk to denote the completion of the roll in each county precinct. Leibowitz suspected forgery and produced expert testimony to prove it.²² Despite the presentation of a powerful defense case, Callahan rejected Leibowitz's motion concerning exclusion.

When Leibowitz argued *Norris* before the Supreme Court, he vigorously pressed not only the exclusion claim but also the assertion that there had been deliberate forgery on the jury rolls. Chief Justice Hughes challenged him to prove the forgery, and Leibowitz responded by presenting the Decatur rolls and a magnifying glass to the court. In an unprecedented step, the eight Justices examined the exhibit.²³ The fact of the forgery figured prominently in Chief Justice Hughes's opinion in *Norris*.²⁴ None of this would have happened if Leibowitz had done a less effective job in proving *de facto* discrimination or less keenly pressed the attack in Decatur. Such tales about legal art and tenacity are worth telling and are curiously muted in *Stories of Scottsboro*.

22. CARTER, *supra* note 1 at 281-83.

23. See REYNOLDS, *supra* note 21, at 293.

24. See 294 U.S. at 592-93. Chief Justice Hughes specifically noted, "The books containing the jury roll in question were produced on the argument at this bar and were examined by the Court." 294 U.S. at 593 n.1.

Similarly puzzling is Goodman's reluctance to explore the give-and-take within the Supreme Court that led to a unanimous decision in *Norris*. Goodman only notes that immediately after releasing *Norris* the Court decided *Grovey v. Townsend*,²⁵ a case allowing the Texas Democratic Party to exclude blacks from membership. Goodman quotes William Pickens of the NAACP, who suggested that *Norris* may have been a consolation prize to African Americans as the Court was about to ratify their exclusion from the political process (pp. 252-53). This brief observation opens the door to a host of broader questions about the attitudes of the men who sat on the Supreme Court in 1935, their opinions about race, their views of the role of the Supreme Court, and the place of the Scottsboro case in their thinking. Much has been written about the lives of these men, their judicial philosophies, and their work as judges.²⁶ This body of scholarship deserved Goodman's scrutiny. In passing it up he ignored one of Scottsboro's most interesting stories.

Goodman's work suffers because he fails to consider other historical legal information as well. Recent scholarship has reminded us that even the greatest defense lawyer of the early twentieth century, Clarence Darrow, was, apparently, not above jury tampering and the suborning of perjury. Geoffrey Cowan, in a volume entitled *The People v. Clarence Darrow*,²⁷ has explored in great detail Darrow's near brush with conviction for attempting to bribe two jurors in the 1911 case of the McNamara brothers, union leaders accused of bombing the *Los Angeles Times* building during a bitter strike. Cowan concludes that Darrow was guilty of the charges against him, as well as other misdeeds involving witnesses, and only escaped a bribery conviction because of jury sympathy.²⁸ The McNamara case was not the only *cause célèbre* touched by this sort of scandal. In the *Sacco-Vanzetti*²⁹ case, the prosecution and defense exchanged bitter charges about an alleged bribery scheme that was to involve the payment of \$50,000 to the prosecutors in exchange for the fixing of the case by the selection of corrupt jurors.³⁰ The case of the Italian anarchists was also marred by the knowing efforts of both sides to offer witnesses who provided distorted or perjured testimony. One of the State's firearms experts,

25. 295 U.S. 45 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

26. On Chief Justice Hughes alone there are a substantial number of books and articles. See, e.g., SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951); MERLO J. PUSEY, CHARLES EVANS HUGHES (1951); Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123; Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4 (1967).

27. GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW* (1993).

28. *Id.* at 434-35.

29. *Commonwealth v. Sacco*, 151 N.E. 839 (1926).

30. See FRANCIS RUSSELL, *TRAGEDY IN DEDHAM* 118-21 (1962).

Captain William Proctor, charged that the prosecution had coached him to give misleading testimony.³¹

McNamara, Sacco-Vanzetti, and similar cases provide a useful framework into which to fit the virtually endless string of perjury and witness-tampering charges made during the Scottsboro litigation. It was not simply that overzealous prosecution and defense attorneys were trying to strengthen their cases when they secreted witnesses, paid them, offered material inducements to get them to change their testimony, or explored the offers of intermediaries to fix the case (pp. 103, 127-28, 139-40). Rather, this all seemed to reflect the morality of a rough-and-tumble era far different from our own. Goodman's analysis of these events would have been substantially enriched by recognition of this background.

III. STORIES, HISTORY, AND THE *CAUSE CELEBRE*

Goodman's work reminds us of the importance that historical narratives can have and, in turn, the potential influence of the historians who fashion those narratives. *Stories of Scottsboro* also demonstrates that a remarkably influential constituent of historical narratives in recent western history has been the legal *cause célèbre*.

No society lives without the stories it calls history. Historical narratives lend social institutions legitimacy and coherence by providing an explanation of the origins and rationale for present policy. A society's stories can be beneficial or calamitously damaging. In his brilliant analysis of the origins and growth of the white Southern Reconstruction story that portrayed Southern whites as victims of a Northern crusade, James Goodman provides a fine example of the evolution of a dangerous historical tale. As noted *supra*, a group of historians connected with Columbia University played a critical part in the development of this narrative.³² While they were not the first to suggest that white Southerners acting through organizations like the Ku Klux Klan were justified in seizing power to defend themselves against the depredations of Northern "carpetbaggers" and unruly ex-slaves, their scholarly work lent these claims a credibility they had never before enjoyed. Almost immediately after the historians articulated their thesis, Dixon's novel and Griffith's film took it up and popularized it.

This example underscores both the potential influence of the tales we tell about history and the importance of the historians who fashion and document the tales. The way a society remembers and explains its past can profoundly affect its present attitudes and ac-

31. See G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO AND VANZETTI* 128 (1948) (reproducing Proctor's affidavit).

32. See *supra* text accompanying note 15.

tions. In Alabama in the 1930s, the Reconstruction story seemed to provide a template for political action for many whites. As in the Reconstruction era, the South had to resist outside agitators, sometimes by force. It had to keep blacks in their place, again by force if necessary. Finally, the South had to view the North as a hostile entity intent upon undermining order and peace for its own venal ends. Self-protective violence, including lynching, was legitimate in light of the threat of another Reconstruction invasion — albeit by communists rather than Union troops.

As the Scottsboro case demonstrates, history's raw material includes dramatic legal proceedings. The tales a society tells about great trials can help identify the central conflicts of an era. Critical cases often involve a clash between governing authority and those who would consciously challenge it. In such proceedings, those in control often seem willing to ignore fair play in order to suppress a perceived threat. Yet, often, at least in democracies, the opposition is powerful enough to challenge this behavior, and the rulers are uncertain enough of themselves to have second thoughts about their chosen course of action. Out of the ensuing clash of forces, both narrowly forensic and broadly social, a set of lessons, or a story, may emerge that leads to a reordering of the legal process or even of relations in the society as a whole.³³

In British legal history, the seventeenth century was crowded with such cases. Among the earliest was the case of Sir Walter Raleigh, who was condemned in the courts of James I for allegedly plotting against the King.³⁴ The evidence consisted of the flimsiest sort of hearsay.³⁵ Despite his repeated requests, the judge never allowed Raleigh to confront his accuser. The English public viewed Raleigh's eventual execution as unjust and opponents of absolute monarchy used the trial to attack the one-sided nature of royal justice. Dramatic courtroom confrontations continued and by the end of the century came to epitomize the struggle between the increasingly authoritarian Stuarts and their increasingly obdurate opponents. Austin Scott argued that the Revolution of 1689 began not

33. E.P. Thompson saw the potential in such clashes for the extension of the rule of law. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

34. Raleigh's Case, 2 Howell's State Trials 1 (1603).

35. Raleigh was convicted and executed on the strength of two pieces of hearsay: first, an out-of-court accusation by a co-conspirator named Lord Cobham, whom the state refused to produce at trial although he was available; second, the following information from a ship's pilot named Dyer:

I came to a merchant's house in Lisbon, to see a boy that I had there; there came a gentleman into the house, and enquiring what countryman I was, I said, an Englishman. Whereupon he asked me, if the king was crowned? And I answered, No, but that I hoped he should be so shortly. Nay, saith he, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.

2 Howell's State Trials at 25.

with Parliament's challenge to James II but with the acquittal of seven bishops of the Church of England on a charge of seditious libel for refusing to obey James's directive that they read his second letter of indulgences in their churches.³⁶ The jury refused to convict in the bishops' case, and its refusal came to be viewed as an example of the middle ranks in English society resisting absolutist tyranny. This case and the tales told about it set the stage for the overthrow of the Stuart monarchy and its replacement by a parliamentary democracy.³⁷

The late 1920s and 1930s were also crowded with cases signaling a growing split between the governing authorities and their challengers. Such cases include not only *Sacco-Vanzetti* and Scottsboro in America, but the Reichstag fire trial in Germany³⁸ and the Moscow Purge trials in the Soviet Union.³⁹ Their nature and connections will be considered in the next section. Here it suffices to note that these cases and, more importantly, the stories told about them, had as powerful an impact on their societies as did the Reconstruction tale in Alabama during the Depression years.

With these observations about stories, history, and great trials in mind, it is worth taking another look at *Stories of Scottsboro*, a volume dedicated to scrutinizing a *cause célèbre*. Goodman brings to bear all the apparatus of story-conscious history to help explore the implications of the case. He persuasively argues that there is no single narrative of Scottsboro but a great mass of stories to be told and considered. He draws many of these stories together and allows them, as a body, to sketch the reality of the society in which the case took place. As Goodman acknowledges in his Introduction, not all stories are equal, and authorial selection, narration, and ordering inevitably guide us in our review of the Scottsboro case. While some of Goodman's guidance can be criticized,⁴⁰ it is never arbitrary or frivolous. Goodman strives to provide us with the stories that illustrate the case's importance, especially with regard to race relations in America and the struggle for minority rights in the South. Goodman does this while successfully laboring to keep sight of the human drama of the nine young men trapped at the center of the maelstrom. These achievements give the book both moral and

36. See Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918).

37. The prominent Canadian legal historian John Beattie has described the revolutionary era as "the heroic age of the English jury, for in the political and constitutional struggles of the reigns of Charles II and James II, trial by jury emerged as the principle defense of English liberties." J.M. Beattie, *London Juries in the 1690s, in TWELVE GOOD MEN AND TRUE* 214, 214 (J.S. Cockburn & Thomas A. Green eds., 1988).

38. See *infra* notes 81-88 and accompanying text.

39. See *infra* notes 89-93 and accompanying text.

40. See *supra* Part II.

intellectual power. Goodman effectively harnesses the storytelling methodology to provide us with a deeper understanding of a critical part of our historical inheritance. He demonstrates the value of periodically revisiting critical moments in our legal history and vindicates the "Tolstoyan" technique of providing many voices to explain an event that may be too complex and variegated for a single narrative explanation.⁴¹

Although Goodman turns the storytelling methodology into a powerful tool, it poses a number of troubling questions. The historians who helped fabricate and validate the Southern white Reconstruction narrative may also be said to have effectively wielded the tool of historical narrative. Their influence on or legitimation of Southern behavior highlights the risks inherent in the creation of tales about society's past. The potential impact of historical work imposes a substantial burden on historians to act thoughtfully and resist formulations that justify oppression, condone violence, or obscure past evil. Inescapably, however, historians' attitudes and the needs of their era and place will color their efforts. In recent years historical theorists have struggled with this point and debated the implications of the time- and culture-bound nature of the historian's endeavor. Hayden White has been a spokesman for those who are convinced that historical narratives can and will be made into whatever society needs at any given moment.⁴² For White all historical work is relative and ought to be judged not by criteria of accuracy but by criteria of effectiveness in serving the needs of society.⁴³ From this vantage point, historical writing is at its best when it helps mobilize society for action.⁴⁴ These propositions have alarmed a substantial number of other historians who believe in the existence of a determinate core of truth in historical analysis and who see the effectiveness standard as an invitation to unprincipled revisionism.⁴⁵ How to deal with the vital memories or stories that are critical to understanding the nature and purposes of society is the challenge always faced by the historian and by society as well.⁴⁶

41. The image of the storytelling technique as comparable to the method Tolstoy used in writing about the Battle of Borodino in *War and Peace* is drawn from Carlo Ginzburg, *Just One Witness, in PROBING THE LIMITS OF REPRESENTATION* 95 (Saul Friedlander ed., 1992).

42. See HAYDEN WHITE, *THE CONTENT OF THE FORM* (1987).

43. HAYDEN WHITE, *The Politics of Historical Interpretation: Discipline and De-Sublimation, in THE CONTENT OF THE FORM*, *supra* note 42, at 58; see also Ginzburg, *supra* note 41, at 82.

44. WHITE, *supra* note 43, at 80-81 (arguing that if the "bourgeois ideology of realism" is to be resisted, we need a history in a nonnarrative mode).

45. See generally JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* (1994); GERTRUDE HIMMELFARB, *ON LOOKING INTO THE ABYSS* (1994); *PROBING THE LIMITS OF REPRESENTATION*, *supra* note 41.

46. Austria, Germany, France, and Canada have all used criminal statutes in efforts to deal with distortions concerning one critical historical event, the Holocaust. See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST* 219 (1993); Eric Stein, *History Against Free Speech*:

IV. A TIME OF TRIALS

An issue outside James Goodman's purview in *Stories of Scottsboro* but important in understanding the events of the late 1920s and 1930s is the remarkable profusion of trials that seemed to play a critical role in the major social changes of the time. Four sets of trials stand out as particularly remarkable in this era. These are: the Massachusetts prosecutions of Sacco and Vanzetti, which concluded with their executions in 1927; the Scottsboro trials; the 1933 trial of those charged by the Nazi regime in Germany with having set fire to the Reichstag; and the 1936 Moscow trials of Communist Party leaders whom Stalin accused of joining a Trotsky-led conspiracy to undermine the government. All became *causes célèbres*, all were manipulated by the communists to their political advantage, all pitted a central authority in flux against some of its most vocal critics, and all significantly affected not only the political landscape of the nation where they arose but the world as well.

Before considering in detail the connections among these cases and the light they shed on their era, it may be useful to sketch some facts about them. The *Sacco-Vanzetti* case began in 1920 with a payroll robbery in South Braintree, Massachusetts, that left a paymaster and a guard dead. The State eventually charged Sacco and Vanzetti, two immigrant Italian anarchists, with the crime. Their trial was conducted in an atmosphere of extreme hostility toward radicals, both because of a post-World War I "Red Scare" and a wave of anarchist bombings.⁴⁷ The judge who presided in the case, Webster Thayer, was overtly prejudiced against the defendants and on a number of occasions gave voice to that prejudice.⁴⁸ The prosecutor, Frederick Katzmann, used virtually every available ploy to obtain a conviction. He tried the defendants as much for their radicalism and foreignness as for the crime.⁴⁹ He or other members of his staff carefully prepared witnesses to give misleading or false testimony,⁵⁰ and he impugned the integrity of all the foreign-born wit-

The New German Law Against the "Auschwitz" — and Other — "Lies," 85 MICH. L. REV. 277 (1986).

47. See JOUGHIN & MORGAN, *supra* note 31, at 210-15; RUSSELL, *supra* note 30, at 83-92.

48. Judge Thayer reportedly made prejudicial statements to the following individuals, among others: Frank P. Sibley ("I'll show them that no long-haired anarchist from California can run this court!"); Lois B. Rantoul; George U. Crocker; and Professor James P. Richardson ("Did you see what I did with those anarchistic bastards the other day. I guess that will hold them for a while. . . . Let them go to the Supreme Court now and see what they can get out of them."). JOUGHIN & MORGAN, *supra* note 31, at 147-48.

49. His cross-examination of the defendants, especially Sacco, was a scurrilous mix of charges involving draft evasion, cowardice, and radicalism. Felix Frankfurter discussed its objectionability at length. See FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 47-62 (1961).

50. See *supra* text accompanying note 31.

nesses who appeared on behalf of the defendants.⁵¹ Although the judge's and the prosecutor's manipulative behavior lent the proceedings the appearance of a sham trial, there was substantial evidence, including eyewitness testimony⁵² and defense witness perjury concerning Sacco's alibi,⁵³ to suggest that at least one of the defendants was guilty.⁵⁴ The jury convicted, and the judge condemned the defendants to death. Six years of appeals followed involving substantial allegations of juror misconduct,⁵⁵ witness tampering,⁵⁶ evidence fabrication,⁵⁷ and judicial misconduct.⁵⁸ Eventually, someone else claimed to have committed the crime.⁵⁹ Throughout the proceedings, local immigrant and anarchist groups treated the case as a frameup and fought for the defendants. The case grew into a *cause célèbre*, however, only in its last two years when the international Communist movement and the American intellectual community became involved.

A rebuilt American Communist Party took up the anarchists' case in earnest beginning in 1925.⁶⁰ The Communists mobilized the ILD, which would later become centrally involved in the Scottsboro case, to raise funds for the defense and to attempt to gain control of the litigation. Although the anarchists' lawyers rebuffed the ILD's two concerted efforts to take the case over, the Communists managed to convert *Sacco-Vanzetti* into a powerful fund-raising and organizing vehicle. Supporters established a Communist-inspired Sacco-Vanzetti Emergency Committee and held large, sometimes turbulent, rallies across the nation.⁶¹ In Europe, at about the same time, the international Communist movement adopted the case as a rallying point. Communist propagandists unceasingly argued that the case demonstrated the oppressive nature of capitalism.⁶² The powerful Communist Parties of France and Germany were able to mobilize much of Europe in support of the defendants. Across the continent, the Communists launched a series of public demonstra-

51. See RUSSELL, *supra* note 30, at 165-74.

52. See JOUGHIN & MORGAN, *supra* note 31, at 77-81 (noting, however, that identification testimony alone was insufficient to convict); RUSSELL, *supra* note 30, at 141-57.

53. See FRANCIS RUSSELL, SACCO AND VANZETTI: THE CASE RESOLVED 109-10 (1986).

54. See RUSSELL, *supra* note 30, *passim*.

55. See JOUGHIN & MORGAN, *supra* note 31, at 115-17 (describing the misbehavior of the jury foreman, Ripley).

56. See *id.* at 126-28 (describing the misbehavior of Captain Proctor); *id.* at 131-35 (describing the misbehavior of witnesses Andrews, Felser, Splaine, and Goodridge).

57. See *id.* at 128-31.

58. See *id.* at 142-48.

59. *Id.* at 137-39 (reporting the confession of Celestino F. Medeiros).

60. See DAVID FELIX, PROTEST: SACCO-VANZETTI AND THE INTELLECTUALS 168-69 (1965).

61. See JOUGHIN & MORGAN, *supra* note 31, at 254-55.

62. See FELIX, *supra* note 60, at 169.

tions.⁶³ Edmund Morgan and Louis Joughin, in their book on the *Sacco-Vanzetti* affair, commented on the international impact of the case: "The diplomatic history of the Sacco-Vanzetti case, brief as it is, demonstrates how quickly the popular imagination of people in other lands can seize upon issues which involve the administration of justice"⁶⁴

The liberal intellectual community in the United States began, from 1926 forward, to join the *Sacco-Vanzetti* agitation. Felix Frankfurter, then a professor at Harvard Law School and a long-time supporter of the Sacco-Vanzetti Defense Committee, urged action in this direction. In March 1927, Frankfurter published the definitive defense of the anarchists in the *Atlantic Monthly*.⁶⁵ Frankfurter's essay, which was reproduced almost immediately in book form,⁶⁶ a Pulitzer Prize-winning 1926 editorial by F. Lauristan Bullard in the *Boston Herald*,⁶⁷ and a long 1927 essay by John Dos Passos called *Facing the Chair*⁶⁸ served as key sources of inspiration for the wide array of thinkers, writers, and social activists who came together to fight for Sacco and Vanzetti's lives. While they failed to save the men, the case bound them together and gave them the first intimations of the power of their writing and thinking. David Felix, in *Sacco-Vanzetti and the Intellectuals*,⁶⁹ has taken this argument even further and suggested that American liberal intellectuals transformed the case into a myth about the betrayal of innocence in America⁷⁰ that they used to challenge the entrenched establishment and help facilitate their claim to power during the New Deal.⁷¹

The lessons of *Sacco-Vanzetti* were not lost on those who sought control of the Scottsboro case. The ILD, which had grown to maturity in the final years of the *Sacco-Vanzetti* struggle, seized control of Scottsboro at the earliest opportunity. It used the case to raise funds and find recruits for the Communist Party all over the United States. The party itself redrafted a host of its positions to facilitate recruitment among African Americans.⁷² Dan Carter, in his book,

63. See *id.* at 207-08, 229-31.

64. JOUGHIN & MORGAN, *supra* note 31, at 280.

65. Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, March 1927, at 409, reprinted in FELIX FRANKFURTER, LAW AND POLITICS 140 (1939).

66. FRANKFURTER, *supra* note 49.

67. JOUGHIN & MORGAN, *supra* note 31, at 248. This editorial is reproduced in FRANKFURTER, *supra* note 49, at 115-18.

68. See JOUGHIN & MORGAN, *supra* note 31, at 244 (discussing the publication of Dos Passos's essay by the Defense Committee).

69. See FELIX, *supra* note 60.

70. *Id.* at 240.

71. *Id.* at 240-49.

72. See CARTER, *supra* note 1, at 148-50 (explaining that Communist organizers de-emphasized party opposition to religion in light of dealings with black churches and shifted

Scottsboro: A Tragedy of the American South,⁷³ neatly demonstrates the nature of the Communist approach:

On May 14, 1931, the Communist Party's Central Committee issued its "Organizational Directives on the Scottsboro Case," which outlined in detail the tactics to be used. Freedom for the Scottsboro boys required the recruitment of thousands of "hitherto politically inactive elements or of workers previously following reformist leadership." Whenever possible, branches of the various bourgeois-liberal groups should be won for permanent affiliation with the ILD or LSNR [League of Struggle for Negro Rights]. Whenever these organizations refused to join, Party and non-Party sympathizers should "fight against the leaders who block the entrance of the organization as a whole" Ideally, the campaign would lead to LSNR and ILD "Neighborhood Committees" on a block-by-block basis in urban areas. Eventually, those who joined the local fronts could be brought directly into the Party.⁷⁴

This expansion strategy was carried out in accordance with Stalin's Comintern Executive Committee directive of 1929 announcing the "Third Period" in world Communism, in which Communist parties were to seize upon issues to foment "demonstrations, strike, and — ultimately — revolution."⁷⁵ In Europe, the Communists organized mass demonstrations and a propaganda campaign that featured speeches by relatives of the Scottsboro defendants.⁷⁶

Yet the Scottsboro case posed a dilemma for the Communists. Although they controlled the defense, they could not simply sacrifice or make martyrs of the boys to further the party's revolutionary aims because this would have discredited them in the eyes of the wider public they sought to mobilize.⁷⁷ The Communists pressed ahead with mass action but also sought to obtain the best counsel and fight the case vigorously in capitalism's courts. A number of observers noted the intellectual, and perhaps strategic, inconsistency between the vigorous social agitation program and the courtroom defense.⁷⁸ There was, throughout the early years of the case, a steady flow of criticism of the Communists for their attempt to manipulate the defense to benefit the more general aims of the Communist Party.⁷⁹ This only diminished in 1935 when Stalin directed the worldwide Communist movement to forge a genuine common front with all those willing to fight the menace of Hitler's

away from a program calling for a separate black republic in the South to focus on the immediate problems of unemployment and starvation).

73. CARTER, *supra* note 1.

74. *Id.* at 141.

75. *Id.* at 64.

76. *Id.* at 172.

77. *Id.* at 139.

78. *Id.*

79. *Id.* at 251.

Nazism.⁸⁰ The Moscow directive led to a sharp shift in policy by the American Communist Party. Liberals and leftists of all sorts were now welcomed as coequal participants in the defense. This shift eventually led to the ascendancy of Allan Knight Chalmers and the depoliticization of the case.

At the same time as Scottsboro was winding its way through the American courts, momentous events were afoot in Europe. These events, too, were punctuated by several remarkable trials. The first took place in September 1933. It involved a group of men the Nazis accused of having conspired to burn down the German parliament building, the Reichstag. The defendants included a possibly unbalanced Dutchman named Marinus van der Lubbe, who had been arrested at the scene of the fire; the leader of the German Communist Party, Ernst Torgler; and a group of Bulgarian communist exiles living in Berlin, Georgi Dimitrov, Simon Popov, and Vassili Tanev.⁸¹ The morning after the fire, February 28, 1933, Adolph Hitler promulgated a decree that effectively granted the Nazi Party control of the government and authorized the suppression of opposition parties.⁸² The speed of the Nazi move and their unflagging efforts to use the fire to discredit their mortal enemies, the Communists, have led many to speculate that the Nazis themselves were responsible for the blaze.⁸³

On September 21, 1933, the Nazis convened the Reichstag fire criminal prosecution. It is clear that the Nazis designed the trial to answer worldwide, frequently Communist-orchestrated, criticism of Hitler's rise to power and the treatment of his opponents. The trial's managers were also consciously attempting to respond to the work of a commission of inquiry that had convened in London and examined the case. The commission's findings, delivered one day before the start of the German trial, were starkly anti-Nazi.⁸⁴ It

80. *Id.* at 331.

81. STEPHEN KOCH, *DOUBLE LIVES* 55-57 (1994).

82. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 29 (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987).

83. *Id.* at 28; *THE REICHSTAG FIRE TRIAL passim* (1934). This volume does not have an authorial attribution although it was clearly the product of the Communists who organized the countertrial in London. It features an introductory chapter by the defendant Georgi Dimitrov. But see FRITZ TOBIAS, *THE REICHSTAG FIRE* (Arnold J. Pomerans trans., G.P. Putnam's Sons 1964) (1962) (challenging the claim that the Nazis were responsible for the fire and suggesting that van der Lubbe acted alone).

84. The Commission found:

(1) That van der Lubbe is not a member but an opponent of the Communist Party;
That no connection whatever can be traced between the Communist Party and the burning of the Reichstag;
That the accused Torgler, Dimitrov, Popov and Tanev, ought to be regarded not merely as innocent of the crime charged but also as not having been concerned with or connected in any manner directly or indirectly with the arson of the Reichstag. (2) That the documents, the oral evidence and the other material in its possession tend to establish that van der Lubbe cannot have committed the crime alone. (3) That the examina-

appears that the Nazis turned to the trial mechanism in the hopes of restoring their international credibility and focusing attention on the misdeeds of their Communist opponents. The results of the trial did not effectively serve these ends.

The Nazis left as little to chance as possible. They arranged for a set of judges whose prior decisions signaled their sympathy with the Nazi regime to preside over the trial.⁸⁵ The defendants' original lawyers were pressured to remove themselves and eventually replaced by court-appointed counsel with impeccable Nazi credentials.⁸⁶ The Nazis manipulated press coverage of the trial to facilitate the dissemination of their views. The true nature of the case was perhaps most clearly revealed when the court, at the prosecution's request, allowed two of the highest-ranking leaders of the Nazi Party, Göring and Goebbels, to address the proceedings, as the court put it "to express [themselves] under oath concerning accusations and slanders which have been directed against [them] from certain quarters."⁸⁷ In long speeches the two attacked the London commission, excoriated Communism, and laid all responsibility for the fire at the Communists' feet. Because of the weakness of the prosecution's case, the trial ended with the acquittal of all but van der Lubbe.⁸⁸ The verdict was a huge propaganda victory for the Communists. The Nazis never again turned to a trial as the primary means of pursuing their enemies or justifying their actions.

The fourth dramatic trial of the era was held in Moscow in 1936.⁸⁹ There sixteen defendants — including Lev Kamenev and Grigori Zinoviev, two of the most powerful leaders of the Soviet Union — were put on trial for their lives. Stalin had secured absolute control of the country and was focused on crushing all opposition within the Communist ranks. His first targets were those on the "left" of the Communist Party who had, in the 1920s, followed

tion of all the possible means of ingress and egress to or from the Reichstag make it highly probable that the incendiaries made use of the subterranean passage leading from the Reichstag to the house of the President of the Reichstag;

That the happening of such a fire at the period in question was of great advantage to the National-Socialist party.

That for these reasons and the others pointed out in the third part of this report grave grounds exist for suspecting that the Reichstag was set on fire by or on behalf of leading personalities of the National-Socialist Party.

THE REICHSTAG FIRE TRIAL, *supra* note 83, at 37.

85. See MÜLLER, *supra* note 82, at 30.

86. See THE REICHSTAG FIRE TRIAL, *supra* note 83, at 97.

87. *Id.* at 178 (quoting Dr. Wilhelm Büniger, the presiding judge and panel president of the Reichstag Fire trial).

88. Recently Stephen Koch has argued that the trial was not a confrontation between Nazis and Communists but part of a conspiracy or collaboration between the two that eventually resulted in the 1939 Nazi-Soviet Pact. See KOCH, *supra* note 81, at 100-03. The propaganda reversals suffered by the Nazis raise substantial questions about this hypothesis.

89. This account of the Moscow purge trial is, unless otherwise noted, based on ROBERT CONQUEST, *THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES* (rev. ed.1973).

Trotsky and argued for immediate collectivization at home and aggressive export of revolution abroad. In early 1934, after the mysterious murder of Kirov,⁹⁰ a prominent and popular Communist leader, Stalin's police arrested Kamenev and Zinoviev, among others. They were held in custody for twenty months and then put on trial, beginning on August 19, 1936.

The trial took place in a large public hall before an audience of citizens — most of whom were, in actuality, agents of the state security apparatus, the NKVD — foreign correspondents, and diplomats. The presiding judges were all members of the military. All the defendants publicly waived the right to counsel. Each of the defendants confessed in court⁹¹ that he had been responsible for the murder of Kirov or had been associated with a "terrorist center" directed by Leon Trotsky or both. The judges sentenced all the defendants to death — an unprecedented decision regarding members of the Communist Party and one that reversed a long-standing anti-capital-punishment tradition in such situations.

In contrast to the Reichstag fire case, the world community generally accepted the Moscow trials' legitimacy. A Western jurist who viewed the proceedings opined that they had been essentially fair.⁹² *New York Times's* reporter Walter Duranty, a leading member of the Western press corps in the Soviet Union, accredited the confessions and the elaborate plot they described.⁹³ The Soviets successfully manipulated the trial mechanism to convince the world of the seriousness of the threat to the Communist state and the propriety of their response. The Communists would eventually use the same story to justify the deaths of millions, and years would pass before it became clear that huge numbers of victims had been brainwashed and tortured into confessing.

Even the briefest description of these four famous trials suggests some of the reasons for their prominence in the 1920s and 1930s. First, the international Communist movement, orchestrated in the Soviet Union, promoted their notoriety and exploited their political potential. Over the course of the early twentieth century, the Communists became exceedingly adept at manipulating trials for propaganda and organizing purposes. The great political gains achieved by American Communists because of the *Sacco-Vanzetti* case fueled

90. Robert Conquest has hypothesized that Stalin had a hand in Kirov's murder. See *id.* at 71-76.

91. Ivan Smirnov, alone among the defendants, gave only a partial confession. See *id.* at 160-61.

92. Conquest cites a *Pravda* reference to the "the English jurist Pritt." *Id.* at 174. One can question Pritt's neutrality since he wrote a foreword to the Communist-fashioned THE REICHSTAG FIRE TRIAL, *supra* note 83.

93. See S.J. TAYLOR, *STALIN'S APOLOGIST: WALTER DURANTY, THE NEW YORK TIMES MAN IN MOSCOW* (1990).

a search for new *causes célèbres*. When Scottsboro came along, the Communist Party and ILD were ready to respond and transform the case into an international event. Similar exploitative skill was apparent in the Communist response to the Reichstag fire charges. With striking alacrity, the Communists organized and mounted a countertrial in London before a so-called International Judicial Investigations Committee.⁹⁴ This proceeding concluded before the German trial could even begin and, coupled with a vigorous propaganda campaign, denied the Nazis any advantage from their show trial.

These events suggest that the Communists had become so adept at the trial "game" that the Moscow trials were a natural and logical extension of what had come before. The Soviets were the preeminent manipulators of the trial mechanism and put their skills to work in the Moscow cases to lend them an appearance of legitimacy. The use of public hearings, in-court confessions, and ample press coverage were all calculated strategies to win international approbation. The international community's acceptance of the Soviet story despite its contradictions and evidentiary weakness speaks volumes about the long-term efficacy of the Communist propaganda effort. The Soviets would rely on the trial mechanism again and again throughout the 1930s, and once more in the early 1950s, to justify brutal and bloody repression.⁹⁵

The great trials of the 1920s and 1930s involved far more than opportunistic Soviet propagandizing. Each case had a vital essence all its own, and each served to personify the struggle taking place in the society in which it arose. Around the world the old order was dying when these cases were tried: America was coming to the end of the era of rough-and-tumble capitalism; Germany was being swallowed by Nazism as Weimar's fragile democracy crumbled; and the Soviet Union was becoming Stalin's totalitarian kingdom. In each society the old and new were at war, and these cases encapsulated that conflict.

In *Sacco-Vanzetti*, outsider-immigrant radicals faced the entrenched power of the state. In this confrontation, onlookers could easily visualize a battle between business as usual and its challengers. Scottsboro fit a similar mold. Its defendants were outsiders who had become the targets of a weakening but still entrenched authority. Proponents of social change could easily convert the defendants' mistreatment into a symbolic representation of the expe-

94. For an extensive description of the Communist role in the countertrial, see KOCH, *supra* note 81, at 97-125.

95. See, e.g., CONQUEST, *supra* note 89, at 341-98 (describing a Soviet trial of "Rightists" in the late 1930s); KAREL KAPLAN, REPORT ON THE MURDER OF THE GENERAL SECRETARY (1990) (describing Soviet-ordered trial and execution of Czech leader Rudolf Slansky).

rience of all those marginalized in the Depression-stricken America of the early 1930s. Alabama's racism could be tied to the growing menace of fascism both at home and abroad. The inflammatory prosecutors, the prejudiced judges, and the constant threat of lynch mobs provided a powerfully persuasive personification of the opposition to social reform in America. The case's reality could be absorbed into a story of great explanatory force and appeal to those enmeshed in turbulent times.

The German political community recognized that the Reichstag fire trial was, from its inception, the embodiment of the key conflicts of its era. For the Nazis it offered a way to dramatize and substantiate their claims about the Communists. For the Communists it offered a means of demonstrating Nazi treachery and brutality. The clash of these combatants over the origins of the fire perfectly mirrored their tragic struggle within German society. Democracy and decency were dying, and, despite its outcome, the trial expressed this unhappy state of affairs. The crude prosecutorial efforts of the Nazis signaled their disrespect for and lack of comprehension of the rule of law.⁹⁶ The trial demonstrated how Nazi rule would debase the once proud tradition of German jurisprudence.⁹⁷ The case personified the destructive relationship between Communism and Nazism. It was like a rehearsal for the war to come, two contending ideologies squared off in combat. The proceedings were an essential touchstone of the times, taken up by the contending forces and made to serve as an instrument of propaganda.

The Moscow trials, by contrast, were remarkable for what they did not show. They did not clearly expose Stalin's murderous plans for the Soviet Union. Instead, they succeeded in clothing his plans in a veneer of justice. Stalin successfully employed the trappings of law to camouflage what were, essentially, sham proceedings. What is striking is that so much of the world was taken in by the charade. Although great trials can personify and reveal, they can also obscure and mislead. As the world moved toward war and began to choose sides, men and women appeared to suspend disbelief. While the 1936 trial in Moscow presented clear intimations of the evil to come, most of those watching were not prepared to hear the news.

All human institutions are imperfect and subject to failure. Trials, judges, and juries, no less than other instruments of governance, are vulnerable. In times of social crisis, certain cases may come to capture the popular imagination as expressions of the essential dilemmas of society. What they are assumed to reveal can foster soci-

96. Hitler is said to have viewed jurists as "complete fools" who were incapable of understanding the needs of the state. MÖLLER, *supra* note 82, at 174.

97. *Id.* at 27-35.

etal understanding or obscure it. In either event, the cases become critical social artifacts of their time. In their proceedings and, even more significantly, in the reaction to those proceedings, one can find substantial clues to the nature of society's struggles. One should not see the cases as providing clear answers but rather intimations. Unpacking *causes célèbres* by telling the stories of the contending participants and onlookers is a powerful technique to facilitate historical insights. James Goodman has helped us substantially by providing an excellent methodology and application in the vitally important Scottsboro case.